

STATE OF NEW YORK

DIVISION OF TAX APPEALS

In the Matter of the Petition	:	
of	:	
YKMS CORPORATION	:	DETERMINATION
AND YOUNG G. LEE, AS OFFICER	:	DTA NO. 808793
	:	
for Revision of Determinations or for Refund	:	
of Sales and Use Taxes under Articles 28 and 29	:	
of the Tax Law for the Period December 1, 1983	:	
through August 31, 1988.	:	

Petitioners YKMS Corporation and Young G. Lee, as officer, 869 Pelham Parkway, Pelham Manor, New York 10803, filed a petition for revision of determinations or for refund of sales and use taxes under Articles 28 and 29 of the Tax Law for the period December 1, 1983 through August 31, 1988.

A hearing was held before Brian L. Friedman, Administrative Law Judge, at the offices of the Division of Tax Appeals, 500 Federal Street, Troy, New York, on November 18, 1991 at 10:45 A.M., with all briefs to be submitted by February 18, 1992. Petitioners appeared by Hak C. Kim, C.P.A. The Division of Taxation appeared by William F. Collins, Esq. (Robert J. Jarvis, Esq., of counsel).

ISSUES

I. Whether petitioner Young G. Lee filed a request for a conciliation conference or a petition for an administrative hearing, i.e., whether the assessments against Young G. Lee were included in the request for a conciliation conference or the petition for an administrative hearing filed on behalf of YKMS Corporation.

II. Whether petitioners filed a petition for an administrative hearing within 90 days after the issuance of the conciliation order, as prescribed by Tax Law § 170.3-a(e).

FINDINGS OF FACT

On August 2, 1989, the Division of Taxation ("Division") issued the following notices

of determination and demands for payment of sales and use taxes due:

<u>Taxpayer</u>	<u>Notice No.</u>	<u>Period</u>	<u>Tax</u>	<u>Total</u> (with Penalty & <u>Interest</u>)
YKMS Corp.	S890802001L	12/1/83-5/31/87	\$127,933.23	\$231,780.18
YKMS Corp.	S890802002L	6/1/87-8/31/88	63,231.88	87,659.21
Young G. Lee	S890802003L	10/9/84-5/31/87	94,688.91	164,597.40
Young G. Lee	S890802004L	6/1/87-8/31/88	63,231.88	87,659.21
YKMS Corp.	S890802005L	6/1/85-8/31/88	--	13,398.78 (omnibus penalty)
Young G. Lee	S890802006L	6/1/85-8/31/88	--	13,398.78 (omnibus penalty)

Previously, YKMS Corporation ("the corporation"), by an officer or by its appointed representative, executed the following consents extending the period of limitation for assessment of sales and use taxes:

<u>Date</u>	<u>Period Extended</u>	<u>Date for Assessment</u>
12/12/87	12/1/83- 2/28/84	6/20/87
5/7/87	12/1/83- 5/31/84	9/20/87
8/18/87	12/1/83-11/30/84	3/20/88
2/19/88	12/1/83- 5/31/85	9/20/88
8/2/88	12/1/83-11/30/85	3/20/89
2/8/89	12/1/83- 5/31/86	9/20/89

On October 20, 1989, the Bureau of Conciliation and Mediation Services ("BCMS") received a Request for Conciliation Conference (Form TA-9.1), dated October 16, 1989, on behalf of the corporation. The Request for Conciliation Conference set forth the name of the taxpayer as YKMS Corporation, but requested the conference for all of the notice numbers included in Finding of Fact "1", with the exception of S890802006L, the assessment of omnibus penalty against petitioner Young G. Lee. Attached to the Request for Conciliation Conference was a corporate power of attorney appointing Wolk & Lawlor as representatives for the corporation. The power of attorney was signed by the president of the corporation (it is unclear whether the signature is that of petitioner Young G. Lee).

On July 13, 1990, BCMS issued a conciliation order (CMS No. 099964) sustaining the statutory notices. The title of the order listed both the corporation and Young G. Lee, as officer, and included notice numbers S890802001L through S890802006L, all of the assessments at issue herein.

On October 22, 1990, the Division of Tax Appeals received a petition (Form TA-10) seeking administrative review of CMS No. 099964. Among the documents attached to the petition was a corporate power of attorney (signed by the president of the corporation) appointing Hak C. Kim, C.P.A., as the corporation's representative. The petition was signed by Mr. Kim and bore a handwritten (by Mr. Kim) date of October 10, 1990. The envelope containing the petition bore a metered mail postmark of October 10th.¹

At the hearing, the Division, in order to prove that the conciliation order (CMS No. 099964) was mailed on July 13, 1990, produced the following:

(a) An affidavit of Joseph Chyrywat, Supervisor of Tax Conferences in BCMS, setting forth the procedures of BCMS in preparing and mailing conciliation orders. The affidavit states that, after certain initial procedures are accomplished, the certified mail, together with a certified mail record (a copy of the certified mail record was attached to the affidavit), are delivered to the Division's mail room. Mr. Chyrywat's affidavit states that all procedures were followed and that, based upon the certified mail record, he affirms that the conciliation order (CMS No. 099964) was sent, by certified mail, to petitioners and to their representative, Hak C. Kim, C.P.A., on July 13, 1990;

(b) An affidavit of James Mannara, Senior Mail and Supply Clerk, which sets forth the mailing procedures after receipt from BCMS, including, but not limited to, delivery to the Albany, New York, Roessleville Branch of the United States Postal Service. The affidavit states that he reviewed the certified mail record (a copy was attached to the affidavit) at issue herein and, based on that review, he affirms that all regular procedures were followed and that an envelope addressed to YKMS Corporation and Young Lee, 869 Pelham Parkway, Pelham Manor, New York was accepted by the United States

¹The year of the metered mail postmark is unclear; it will be presumed, however, that it was 1990. The setting of the month indicated both September and October ("OCT/SEP"); however, since the handwritten date on the petition was October 10, it will again be presumed the proper date of the postmark was October 10, 1990.

Postal Service for delivery, by certified mail, on July 13, 1990.

Attached to the petition was a power of attorney from the corporation appointing Hak C. Kim, C.P.A., as its representative in this matter. The power of attorney was signed by G. Young Lee who, presumably, is the same person as petitioner, Young G. Lee. Nevertheless, there is no power of attorney on file which permits Hak C. Kim to represent Young G. Lee. At the hearing, the Administrative Law Judge asked Mr. Kim to furnish the Division of Tax Appeals with a power of attorney from Mr. Lee and it was agreed by Mr. Kim that such power of attorney would be provided after the hearing. No power of attorney executed by Young G. Lee was ever furnished.

Petitioners' representative, Hak C. Kim, testified that he prepared the petition and gave it to his secretary for typing on October 10, 1990. He recalled reviewing the petition after it was typed. The normal office procedure is for his secretary to take the outgoing mail to a branch Post Office located at 32nd Street in New York City. Since the Post Office closes at 5:00 P.M., the secretary leaves work at 4:45 P.M. in order to insure that outgoing mail is mailed on the day of its preparation. Mr. Kim stated that the envelope in question was not metered in his office. At the hearing he stated that he did not know why the envelope bore a metered mail postmark and not a United States Postal Service postmark. The normal procedure is for his secretary to pay for postage at the Post Office out of petty cash.

After the hearing, petitioners produced an affidavit from James Ju, sworn to before a Notary Public on January 10, 1992, which stated as follows:

"1. I am the manager YIE & Company located at 29 West 30th Street, Suite 901, New York, N.Y., and make this affidavit at the request of Hak Chul Kim.

"2. I have read the unsworn affidavit of Kwang S. Lee and remember this matter because I joked with her and Mr. Kim about Mr. Kim's use of our postage machine in order to arrive at the exact postage of 65 cents, and, that the date was October 10, 1991, a [C]hinese holiday.

"3. I also remember that Mrs. Lee mentioned that the mailing deadline for the document was the same day, and that she had to then leave my office and immediately mail the document. This also caused me to remember this incident because unusually [sic] Mrs. Lee would come in use the machine, and then stay for a little while to chat, but on this day she had to leave immediately."

Petitioners' representative, Hak C. Kim, stated that his secretary had moved to Chicago, but that he would attempt to provide an affidavit from her concerning the mailing of the petition. On January 10, 1992, he sent to the Administrative Law Judge a copy of a proposed affidavit which, in an accompanying letter of the same date, he stated would be signed by the secretary and mailed directly to the Administrative Law Judge. The proposed affidavit from the secretary, Kwang S. Lee, was never received by the Administrative Law Judge; therefore, its contents shall not be considered herein.

CONCLUSIONS OF LAW

A. Since the Request for Conciliation Conference, the resulting conciliation order and the petition for administrative hearing each made specific reference to the notices of determination issued to both the corporation and to Young G. Lee, as officer, such request and petition shall be deemed to have been made on behalf of both petitioners, despite the apparent lack of a power of attorney for petitioner Young G. Lee.

However, since the representative of the corporation, Hak C. Kim, did not furnish, either prior to or subsequent to the hearing, a valid power of attorney from Young G. Lee despite instructions from the Administrative Law Judge to do so and since Young G. Lee did not appear at the hearing, such petitioner must be held in default. All subsequent references to petitioner shall, therefore, refer only to the corporation.

B. Tax Law § 170.3-a(e) provides, in pertinent part, that a conciliation order shall be binding upon the taxpayer unless such taxpayer petitions for a hearing within 90 days after the conciliation order is issued. A conciliation order is "issued" within the meaning of Tax Law § 170.3-a(e) at the time of its mailing to the taxpayer (Matter of Wilson, Tax Appeals Tribunal, July 13, 1989).

Based upon the affidavits of Joseph Chyrywat, Supervisor of Tax Conferences in BCMS, and of James Mannara, Senior Mail and Supply Clerk, and the certified mail record attached to each of the above affidavits, it must be found that the conciliation order (CMS No. 099964) was issued on July 13, 1990. Accordingly, petitioner had 90 days, or until October 11,

1990, to file a petition for an administrative hearing.

C. 20 NYCRR 3000.16(b) provides, in pertinent part, as follows:

"(b) Postmarks not made by the United States Postal Service. (1) If the postmark on the envelope or wrapper containing the document is made by other than the United States Postal Service (i.e., office metered mail):

"(i) the postmark so made must bear a date which falls within the prescribed period or on or before the prescribed date for filing the document (including any extension of time granted for filing the document); and

"(ii) the document must be received by the State of New York Division of Tax Appeals or the Tax Appeals Tribunal, Riverfront Professional Tower, 500 Federal Street, Troy, NY 12180, not later than the time when an envelope or other appropriate wrapper which is properly addressed and mailed and sent by the same class of mail would ordinarily be received if it were postmarked at the same point of origin by the United States Postal Service within the prescribed period or on or before the prescribed date for filing (including any extension of time granted for filing the document).

"(2) In case the document is received after the time when a document so mailed and so postmarked by the United States Postal Service would ordinarily be received, such document will be treated as having been received at the time when a document so mailed and so postmarked would ordinarily be received, if the person who is required to file the document establishes:

"(i) that it was actually deposited in the mail before the last collection of the mail from the place of deposit which was postmarked (except for metered mail) by the United States Postal Service within the prescribed period or on or before the prescribed date for filing the document;

"(ii) that the delay in receiving the document was due to a delay in the transmission of the mail; and

"(iii) the cause of such delay."

In the present matter, the office metered postmark (October 10, 1990) was within the 90-day period for the filing of a petition (such period expired on October 11, 1990). However, the petition was not received by the Division of Tax Appeals until October 22, 1990, or 12 days later. In Matter of Harron's Electric Service (Tax Appeals Tribunal, February 19, 1988), the Tribunal, in concluding that receipt five days after the date of a metered stamp was within the period when a document would ordinarily be received when mailed through the United States Postal Service, stated:

"Five days is, in our opinion, not later than the date a document would ordinarily be received when mailed through the United States Postal Service. We find support for this conclusion in that subdivision 2 of section 2103 of the Civil Practice Law

and Rules in effect recognizes five days as the ordinary time of mailing."

Twelve days cannot be found to be a reasonable period within which a document would ordinarily be received when mailed through the United States Postal Service. That being so, petitioner is bound by the provisions of 20 NYCRR 3000.16(b)(2). Even if the testimony of petitioner's representative, Hak C. Kim, is accepted along with the affidavit of James Ju (see, Findings of Fact "7" and "8") to prove that the envelope was deposited in the mail within the prescribed time (and it must be noted that only the person who allegedly mailed the petition, Mr. Kim's secretary, can actually state when the envelope was deposited in the mail and her proposed affidavit was never signed, sworn to or submitted to the Administrative Law Judge), petitioner must also prove that the delay in receiving the document was due to a delay in the transmission of the mail and the cause of such delay (20 NYCRR 3000.16[b][2][ii], [iii]) and petitioner has failed to introduce any evidence regarding the 12-day delay from metered postmark to receipt. As a result thereof, the petition must be deemed untimely.

D. The petition of YKMS Corporation is dismissed.

E. The petition of Young G. Lee, as officer, is denied, and the notices of determination and demands for payment of sales and use taxes due issued August 2, 1989 are sustained.

DATED: Troy, New York
October 8, 1992

/s/ Brian L. Friedman
ADMINISTRATIVE LAW JUDGE